Personal Jurisdiction Takes Center Stage in Covington Catholic Students' Suit

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A viral controversy at the heart of America's culture war[1] led to the resolution of a very different controversy concerning personal jurisdiction in the Sixth Circuit.[2] The confrontation at the Lincoln Memorial between Covington Catholic High School students participating in the March for Life rally and various other activists including Native American Nathan Phillips captivated the media in early 2019.[3] California resident Kathy Griffin and New Jersey resident Sujana Chandrasekhar condemned the students' actions on Twitter resulting in some parents filing complaints in the Eastern District of Kentucky based on diversity jurisdiction.[4] The Sixth Circuit consolidated the cases in Blessing v. Chandrasekhar and clarified that Kathy Griffin's appearance of counsel did not waiver her personal jurisdiction defense before upholding a lack of personal jurisdiction over both women.[5]

The intricacies of civil procedure were raised when the students' parents argued "that Kathy Griffin waived her personal jurisdiction defense when her lawyer filed a notice of appearance of counsel two weeks before moving to dismiss."[6] The Sixth Circuit took this opportunity to clarify its 2011 ruling in *Gerber v. Riodran*, that created confusion in determining when the personal jurisdiction defense was waived or forfeited.[7] This was not the Sixth Circuit's first attempt at clarifying this issue but the previous attempts "failed to give

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[1] *See* Eugene Scott, *Trump's Defense of Covington Teens Latest Skirmish in Culture War About 'Toxic Masculinity'*, WASH. POST (Jan. 22, 2019, 8:19 PM), https://www.washingtonpost.com/politics/2019/01/22/trumps-defense-covington-teens-is-latest-skirmish-culture-war-about-masculinity/ [https://perma.cc/AP9P-4C2P]; Editorial Board, Opinion, *The High School Deplorables*, WALL ST. J. (Jan. 22, 2019, 7:07 PM), https://www.wsj.com/articles/the-high-school-deplorables-11548202058 [https://perma.cc/YU8H-H8N8].

[2] *See* Blessing v. Chandrasekhar, Nos. 2:20-cv-00016; 2:19-cv-00126, 2021 WL 684863, at 5–13 (6th Cir. Feb. 23, 2021).

[3] *See Lesson Plan: Covington Catholic Incident Through a Media Literacy Lens*, PBS (Jan. 25, 2019), https://www.pbs.org/newshour/extra/daily-videos/lesson-plan-covington-catholic-incident-through-a-media-literacy-lens/ [https://perma.cc/UD6K-7G4T].

[4] *See Blessing*, 2021 WL 684863, at 3–4.

[5] *See id.* at 23.

[6] *Id.* at 5.

[7] *See id.* at 5 (citing Gerber v. Riordan, 649 F.3d 514 (6th Cir. 2011)).

adequate guidance to district courts over whether a notice of appearance causes a waiver or forfeiture of a personal jurisdiction defense."[8]

Beginning with Rule 12 of the Federal Rules of Civil Procedure, a personal jurisdiction defense is waived by failing to make it by motion.[9] The question is: at what point in the proceeding must a personal jurisdiction defense be asserted or else be waived?[10] In *Gerber*, the Sixth Circuit offered two conflicting answers.[11] First, the Sixth Circuit applied a reasonableness test to determine whether a defendant's actions created an "expectation that [Defendants] will defend the suit on the merits or must cause the court to go to some effort that would be wasted if personal jurisdiction is later found lacking."[12] Second, the Sixth Circuit held that the personal jurisdiction defense was waived by the defendants' attorney entering a general appearance.[13] That holding was misconstrued as creating a bright line rule so the Sixth Circuit used the facts concerning Kathy Griffin to clarify.[14]

In *Blessing* the Sixth Circuit held that "a case-specific analysis of a defendant's litigation conduct" is required to determine forfeiture or waiver of a personal jurisdiction defense.[15] The Sixth Circuit sidestepped a case from 2012 where it reached the opposite conclusion by pointing out that the case "was unpublished and is therefore not binding."[16] Instead, the Sixth Circuit emphasized its "subsequent cases have largely cited *Gerber* for its fact-specific inquiry into the defendant's litigation conduct, rather than as establishing any sort of bright line rule."[17] The court went on to explain precisely why a bright line rule does not make sense in this context.[18]

Two reasons make a bright line rule inapplicable. First, it would be inconsistent with circuit precedent which *Gerber* did not overrule,[19] and "the earlier of two conflicting panel holdings controls."[20] Second, it would be inconsistent with Rule 12 and Due Process which are "designed to protect

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[8] *Id.* at 8 (citation omitted); *see also* King v. Taylor, 694 F.3d 650 (6th Cir. 2012); M & C Corp. v. Erwin Behr GmbH & Co., KG, 508 F. App'x 498 (6th Cir. 2012); Bougler v. Woods, 917 F.3d 471 (6th Cir. 2019).

[9] Fed. R. Civ. P. 12(h)(1).

[10] *Blessing*, 2021 WL 684863, at 6–7.

[11] *See id.* at 9.

[12] *Gerber*, 649 F.3d at 519 (quoting Mobile Anesthesiologists Chicago, LLC v. Anesthesia Associates of Houston Metroplex, P.A., 623 F.3d 440, 443 (7th Cir. 2010)).

[13] *Id.* at 520.

[14] *See Blessing*, 2021 WL 684863, at 8–9.

[15] *Id.* at 10.

[16] *Id.* at 10 n.9 (referencing M & C Corp. v. Erwin Behr GmbH & Co., KG, 508 F. App'x 498 (6th Cir. 2012)).

[17] *Id.* at 10 (citations omitted).

[18] *Id.* at 10–13.

[19] *Id.* at 11 (citing Rauch v. Day & Night Mfg. Corp., 576 F.2d 697 (6th Cir. 1978); Friedman v. Estate of Presser, 929 F.2d 1151 (6th Cir. 1991)).

[20] *Blessing*, 2021 WL 684863, at 10 (quoting United States v. Simpson, 520 F.3d 531, 539 (6th Cir. 2008)).

parties from the unintended waiver of any legitimate defense or objection."[21] Thus, a personal jurisdiction defense must be raised "in a pre-answer motion or answer, whichever is filed first,"[22] but the reasonableness test used in *Gerber* should always be applied to the facts of a case.[23]

Having resolved the confusion generated by *Gerber*, the Sixth Circuit demonstrated the appropriate analysis with respect to the facts concerning Kathy Griffin.[24] First, the notice of appearance of counsel did not give the complainants a reasonable expectation that she would not assert a personal jurisdiction defense and instead defend the suit on the merits.[25] Second, "the two-week window between the notice of appearance and the motion to dismiss did not cause the Court to engage in any efforts that would be wasted if such defense proved successful."[26] Both prongs of the reasonableness test were thus satisfied so Kathy Griffin's "litigation conduct" did not waive her personal jurisdiction defense.[27]

This holding conforms with approaches taken in other circuits for determining when a personal jurisdiction defense is waived.[28] In the Fifth Circuit a party submits to a court's jurisdiction in a general appearance by "invoke[ing] the judgment of the court on any question other than jurisdiction."[29] And the Eleventh Circuit responded to *Gerber* by concluding "Rule 12 does not provide for waiver by filing a notice of appearance."[30] So while the culture wars wage on,[31] harmony has nevertheless been restored to the issue of personal jurisdiction in the Sixth Circuit.

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[21] *Id.* at 11–12 (quoting *Rauch*, 576 F.2d at 701 n.3).

[22] *Id.* at 11 (citing Fed. R. Civ. Pro. 12(h)). The Sixth Circuit also referred to this turning point as a respondent's "first defensive move." *Id.* (quoting *Rauch*, 576 F.2d 701).

[23] *See id.* at 12–13.

[24] *See id.* at 13–14.

[25] *See id.* at 14.

[26] *Blessing*, 2021 WL 684863, at 14 (quoting 20-5852, DE 38, Order, Page ID 225).

[27] *Id.* at 14.

[28] *See, e.g.*, Maiz v. Virani, 311 F.3d 334 (5th Cir. 2002); Pouyeh v. Public Health Trust of Jackson Health Sys., 718 Fed Appx 786 (11th Cir. 2017).

[29] *Maiz*, 311 F.3d at 340.

[30] *Pouyeh*, 718 Fed Appx at 791.

[31] *See* Philip Bump, *Trump Is the Culture War. The Culture War Is the Base. Now What?*, WASH. POST (Feb. 16, 2021, 2:31 PM), https://www.washingtonpost.com/politics/2021/02/16/trump-is-culture-war-culture-war-is-base-now-what/ [https://perma.cc/VQ2R-APHS]; Editorial Board, Opinion, *The Culture Wars Are Coming to the SEC*, Wall St. J. (Mar. 3, 2021, 6:25 PM), https://www.wsj.com/articles/the-culture-wars-are-coming-to-the-sec-11614813925 [https://perma.cc/F7HH-M7HR].